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IN THE

Supreme Court of the United States

October Term, 1974
No. 74-398

PLAN FOR ARCADIA, INC., a non-profit corporation,
Petitioner,

vs.

ANITA ASSOCIATES, SANTA ANITA CONSOLIDATED, INC., RUSSELL TRAIN, as Administrator, Environmental Protection Agency, RONALD REAGAN, Governor of the State of California, JOHN MAGA, Executive Officer, California Air Resources Board, ROBERT G. LUNCHE, Acting Air Pollution Control Officer for Los Angeles County Air Pollution Control District and CITY OF ARCADIA CITY COUNCIL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief for Respondents Anita Associates and Santa Anita Consolidated, Inc. in Opposition to the Issuance of the Writ.

Pursuant to Rule 24 of the Rules of the Supreme Court, respondents Anita Associates and Santa Anita Consolidated, Inc. ("Santa Anita") oppose the issuance of a writ of certiorari in the above-entitled case for the reasons set forth in this brief.

JURISDICTION AND STATUTES INVOLVED.

Petitioner correctly states the basis of this Court's jurisdiction and correctly cites the constitutional and statutory provisions applicable to the questions raised by this petition, except that petitioner does not cite or set forth Sections 1857c-5 and 1857c-6 of Title 42 of the United States Code or 88 Stat. 246 (1974) (not yet codified), which are set forth in pertinent part in Appendix A hereto.

QUESTIONS PRESENTED FOR REVIEW.

In attempting to set forth issues worthy of this Court's attention, petitioner limits itself to two contentions. First, petitioner complains of the refusal of the Court of Appeals to entertain its argument, raised for the first time on appeal, that mandamus should issue to compel the Administrator of the Environmental Protection Agency to exercise his emergency powers under the Clean Air Act. Second, petitioner contends that a private cause of action exists under the Clean Air Act to enforce ambient air quality standards even in the absence of implementing regulation. These respondents will treat these contentions in reverse order to facilitate logical and concise argument.

STATMENT OF THE CASE.

A. Nature of the Case.

In the proceedings below, petitioner[1] sought principally to prevent the development of Santa Anita Fashion Park ("Fashion Park"), a shopping center, by respondent Anita Associates.[2] To this end, petitioner sought a temporary restraining order and a preliminary injunction against these respondents and a writ of mandate addressed to the public entity respondents herein requiring them to take steps to halt the challenged developments. Petitioner based its prayer primarily upon allegations that the developments at issue were in violation of the Clean Air Act as amended [42 U.S.C. § 1857 *et seq.* (1970).]

Anita Associates and Santa Anita will address themselves principally to the merits of petitioner's contentions concerning the requirements of the Clean Air Act. Factually, Anita Associates and Santa Anita contended vigorously below that Fashion Park will reduce rather than increase air pollution in the San Gabriel Valley.[3] For purposes of this petition, of course, these

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[1]Originally, there were two plaintiffs in this action, petitioner and an individual named Jack Saelid. Mr. Saelid withdrew, however, following the decision of the Ninth Circuit affirming the dismissal of this action, pursuant to leave to withdraw granted by the Court of Appeals by order dated August 28, 1974.

[2]Secondarily, petitioner sought to prevent the construction of a new parking lot off Baldwin Avenue for Santa Anita racetrack by appellee Santa Anita. The Baldwin Avenue Parking Lot, except for landscaping, was complete and had been open to the public for nearly two months by the time this action was filed. It is now entirely complete, and petitioner does not appear to continue to challenge this development.

[3]Indeed, the evidence before the District Court on the beneficial regional, as opposed to local, impact of Fashion Park was uncontested. Shopping centers are attractive to the consumer

(This footnote is continued on next page)

factual contentions are irrelevant because the Act itself does not prohibit the development at issue; and, even if it did, petitioner lacks standing under the Act to challenge the development.

B. The Proceedings Below.

Petitioner filed its complaint herein in the United States District Court for the Central District of California and applied for a temporary restraining order on October 23, 1973. [Clerk's Transcript ("C.T."), Vol. I, p. 1] Following a brief hearing in the chambers of the Honorable Jesse W. Curtis on October 24, 1973, the application was denied, but November 5, 1973, was set for a hearing on appellants' motion for preliminary injunction. When this matter came on for hearing, however, Judge Curtis indicated that the matter seemed ripe for summary judgment and proposed that it be treated in that fashion. [Reporter's Transcript ("R.T."), p. 4]. The parties present or represented by counsel at that hearing—petitioner Plan for Arcadia and then-plaintiff Jack Saelid and respondents

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who will often seek them out even if substantial driving distances are involved. At present, few such centers are located in the San Gabriel Valley so that shopping trips often involve long trips to distant centers. The location of Fashion Park in the San Gabriel Valley will alter this pattern, enabling the residents of that area to make fewer and shorter trips. It is anticipated that 100,000 passenger vehicle miles per day will be eliminated, eliminating as well the motor vehicle emissions associated with this travel. The overall result of Fashion Park, therefore, will be improvement of the air quality in the San Gabriel Valley. [Affidavit of Donald Frischer and Joint Affidavit of John Dunzer, Vincent Mestre and G. S. Samuelson, C.T., Vol. II, pp. 76-79, 99-103.]

Santa Anita, Anita Associates and Russell Train, Administrator of the Environmental Protection Agency—stipulated to this procedure and the matter was so submitted. On November 16, 1973, pursuant to previously obtained leave of Court, petitioner submitted an additional affidavit in support of its position. [C.T., Vol. I, p. 129.] On December 12, 1973, Judge Curtis issued his memorandum opinion denying petitioner's motion for preliminary injunction and dismissing the complaint. [C.T., Vol. I, p. 136.]

On January 7, 1974, appellants unsuccessfully moved the District Court for an injunction pending appeal. [R.T. p. 36.] At that time, in an effort to make this matter ripe for appeal as quickly as possible, petitioner urged the District Court not to prepare and file findings of fact and conclusions of law. Respondents Anita Associates and Santa Anita believed such findings and conclusions to be required by Fed.R.Civ. P. 50 inasmuch as the matter had initially been submitted as a motion for preliminary injunction. [R.T. pp. 37-40.] Anita Associates and Santa Anita withdrew their request for findings and conclusions, however, in return for petitioner's stipulation waiving any procedural defects which might exist in the manner in which judgment had been reached. [C.T., Vol. I, p. 156.]

C. Summary of Relevant Facts.

1. Fashion Park.

On April 30, 1970, Santa Anita filed with the City of Arcadia ("City") a zone change application to permit the development of a regional shopping center to be known as Santa Anita Fashion Park.[4] The development was to include three major department stores and approximately seventy mall stores.

The Planning Commission of the City held extensive public hearings on this application. The evidence received included discussion of planning, economic, traffic, social, environmental and aesthetic matters. On February 5, 1971, the City Council adopted a resolution placing on the ballot as a referendum the question of whether the zoning change should be adopted to permit the development of Fashion Park. The zoning change itself was, if approved in the referendum, to be subject to a number of detailed conditions, which were

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[4]The majority of the facts in this statement find their support in the Findings of Fact and Conclusions of Law signed by the Honorable Joseph A. Sprankle in an earlier case under the California Environmental Quality Act involving petitioner and the private respondents herein, *Plan for Arcadia v. City of Arcadia City Council, et al.*, in the Superior Court of the State of California for the County of Los Angeles. The judgment therein, adverse to petitioner, was affirmed on October 28, 1974, by the Court of Appeal of the State of California for the Second Appellate District.

A copy of Judge Sprankle's Findings and Conclusions is attached to the Affidavit of James W. Colbert, III. [C.T., Vol. II, p. 1.] Unless otherwise noted, all factual assertions will find support in this document. Judge Sprankle's findings were based upon declarations filed in that action and upon the administrative record of proceedings before the City Council of the City of Arcadia. The District Court took judicial notice of the administrative record to the extent that Judge Sprankle's Findings were based upon declarations, Anita Associates and Santa Anita presented supporting affidavits to the District Court. [C.T., Vol. I, p. 63; Vol. II, pp. 69, 80, 86, 92, 95.]

presented to the electorate with the same ballot sent to all registered voters. On April 20, 1971, the voters of the City of Arcadia approved the proposition.

On April 6, 1972, Santa Anita leased the site for Fashion Park to Anita Associates, and Anita Associates submitted preliminary plans to the City Council for approval. On August 15, 1972, these plans were approved.

2. Construction Prior to the Initiation of This Action.

Anita Associates applied for a grading permit for the Fashion Park site on February 26, 1973. The Director of Public Works held up the issuance of that permit, however, requesting that Anita Associates provide the City with data to assist in the preparation of an environmental impact report for the development. On March 12, 1973, following public hearings, the Planning Department submitted to the City Council, with a copy of petitioner Plan for Arcadia, a document entitled Environmental Impact Report. On March 20, 1973, the City Council approved the report for Fashion Park; and, on March 21, 1973, the City issued a grading permit for the Fashion Park site. Anita Associates began work soon thereafter.

On June 6, 1973, Anita Associates obtained a foundations-only building permit from the City of Arcadia for the commencement of construction of Fashion Park. Ground was broken and the first footings poured and rebar work began that same day. The foundations were completed on October 26, 1973. [Affidavit of Ernie Weber, C.T., Vol. I, p. 63.]

A full building permit was obtained on July 10, 1973. Masonry work began on July 26, 1973, miscellaneous metal work on August 1, 1973, electrical work

on September 5, 1973, plumbing on September 12, 1973. Work on elevators and escalators began on September 10 and 11, 1973, respectively. Structural steel work began on October 17, 1973. [Affidavit of Ernie Weber, C.T., Vol. I, p. 63.]

Off-site improvements on the adjoining streets, paid for by Anita Associates, began on June 8, 1973. They were substantially completed on September 28, 1973. [Affidavit of Ernie Weber, C.T., Vol. I, p. 63.]

ARGUMENT.

A. INTRODUCTION TO CLEAN AIR ACT CONCEPTS.

The Clean Air Act, enacted in 1963 and amended in 1967 (the "1967 amendments") and in 1970 (the "1970 amendments"), created a unique system of regulation for the improvement and control of air quality throughout the United States. The Act mandates cooperation between state and federal authorities in a complex and often confusing manner that is largely unparalleled in other legislation. Intelligent discussion of the Act and its scope necessarily requires as background a brief history of the Act and a rapid sketch of its regulatory approach.[5]

1. The Clean Air Act Under the 1967 and 1970 Amendments.

The Clean Air Act has its historical genesis in legislation enacted in 1963 as an incentive to research and study of the air pollution problems of the nation and as an aid to state enforcement of pollution controls through limited federal participation in enforcement. 77 Stat. 392. More important, however, were the 1967 amendments (known as the Air Quality Act of 1967 [81 Stat. 485]) which resulted in major changes in the Clean Air Act and provided the conceptual basis of the present regulatory approach. Finding air pollution control to be properly a matter principally of state and local responsibility (42 U.S.C. § 1857), Congress took an approach that left the states almost solely in control of setting standards, of devising plans for meeting those

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[5]A general treatment of this topic can be found in *The Clean Air Amendments of 1970*, 12 Boston College Industrial and Commercial Law Review 571, 574-93 (1971).

standards and of enforcing the rules promulgated as part of those plans. Aside from the well publicized provisions dealing with motor vehicle emission standards and other limited areas not relevant herein, the federal legislation did not, of itself, purport to make any specific activity unlawful.

The 1970 amendments to the Clean Air Act were responsive to widespread criticism of the ineffectiveness of the 1967 amendments in general and of the way they were being administered in particular. See, *The Clean Air Amendments of 1970, supra* at n.4, at 577-581. The 1970 amendments are sufficiently broad and supplant enough of the 1967 amendments to constitute the entirely new statutory scheme presently in effect. They do, however, retain much of the philosophy of the 1967 amendments in their approach toward state responsibility for regulation with the important difference that tight federal control is maintained throughout in order to ensure the enactment of effective and comprehensive regulatory programs.

Under the 1970 amendments the Administrator of the Environmental Protection Agency must publish ambient air quality standards for each pollutant for which criteria had been established under the previous legislation.[6] 42 U.S.C. 1857c-4 (1970). The 1970 amendments are not regulatory in nature. Aside from provisions, not relevant here, dealing with motor vehicle emissions, they do not purport to prohibit any

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[6]The Administrator is required to publish "primary" and "secondary" standards, the former at levels sufficient to protect health, the latter at levels necessary to protect public welfare. On November 25, 1971, the Administrator did publish such standards for the pollutants commonly associated with motor vehicle emissions: photochemical oxidants, carbon monoxide and nitrogen dioxide. 40 C.F.R. §§ 50.8, 50.9 and 50.11.

specific activity. Rather they mandate regulatory activity by the states and by the Administrator to create a comprehensive and integrated program of prohibitions and limitations for the attainment of the ambient air quality standards, specifically requiring, for the first time, the inclusion of programs of traffic control. The initial responsibility for devising implementation plans for achieving these standards is left with the states. The Administrator is given the primary responsibility of designating for regulation new stationary pollution sources and for setting emission standards for them (42 U.S.C. 1857c-6), and for adopting regulations dealing with hazardous pollutants not covered by the ambient air quality standards (42 U.S.C. 1857c-7). The 1970 amendments give the Administrator the authority and the obligation to promulgate his own implementation plan for any given area should the state involved fail to meet the deadlines for promulgation contained in the Act. 42 U.S.C. 1857c-5.

2. Regulatory Structure at the Time the Action Was Filed.

When this action was brought, no comprehensive implementation plan had yet been adopted for the region containing the Los Angeles Metropolitan Area. Many of the substantive provisions of the implementation plan proposed by the State of California as they related to that region had been rejected by the Administrator, although portions of the plan had been adopted. 40 C.F.R. part 52, subpart F. In addition, the Administrator had proposed several well publicized supplemental traffic control regulations for inclusion in this region's implementation plan. At that time, however, there were no regulations in effect that purported

to govern the activity involved in the development at issue here.

3. Statutory and Regulatory Developments Since the Action Was Filed.

Since October 23, 1973, the Administrator has promulgated two distinct but overlapping sets of regulations requiring preconstruction review of developments similar to Fashion Park. The first set of regulations, the California Transportation Control Plan, was published November 12, 1973 [38 Federal Register No. 217, at 31231; 40 C.F.R. part 52, subpart F], as a portion of the California implementation plan. Relevant portions of the California Transportation Control Plan required the Administrator or his designee to review, prior to construction or modification, the development or addition of a specified number of parking spaces to any parking facility. 40 C.F.R. § 52.251. This review procedure applies to facilities whose construction or modification was commenced after August 15, 1973. The effective date of these regulations has been deferred by successive amendments by the Administrator to June 30, 1975. 39 Fed. Reg. No. 3, at 1025 (January 4, 1974); Reg. No. 10, at 1848 (January 15, 1974); 39 Fed. Reg. No. 200 at 36870 (October 15, 1974).

The second set of regulations are those which appellants sought from the Administrator below, regulations governing review of "indirect sources," *i.e.*, developments which do not themselves emit pollutants but which have associated activities which do so. The Indirect Source Regulations were published February 25, 1974 and are incorporated into the implementation plans of several states, including California. 39 Fed.

Reg. No. 38, at 7270-7285; 40 C.F.R. § 52.22. The Indirect Source Regulations, which also cover developments like Fashion Park, require the Administrator or his designee to review, prior to construction or modification, parking facilities of specified capacities within a Standard Metropolitan Statistical Area, such as Los Angeles. The regulations are effective January 1, 1975, and cover developments commenced after that date.

The Clean Air Act was amended in June of this year by the enactment of the Energy Supply and Environmental Coordination Act of 1974. 88 Stat. 246 (1974 U.S. Code Cong. & Admin. News 1663-1685). Section 4(b) of that act prohibits certain types of regulation of parking facilities, requires the Administrator to submit certain analyses to Congress and ratifies the deferral until January 1, 1975, of any regulations requiring preconstruction approval of parking facilities.

B. PETITIONER'S CLAIMS WITH REGARD TO ENFORCEMENT OF THE AMBIENT AIR QUALITY STANDARDS BY PRIVATE ACTION WERE PROPERLY DISMISSED.

1. Neither the Clean Air Act nor the Ambient Air Quality Standards Promulgated Thereunder, Absent Implementing Regulation, Prohibit the Development at Issue.

Petitioner has placed its primary hope throughout of this action on an effort to establish prohibitions against the construction of developments such as Fashion Park based solely upon the ambient air quality standards and the nonregulatory provisions of the Act, particularly upon sections 1857c-4 and 1857c-5 of Title 42 which require the promulgation of imple-

menting regulations. Since, as discussed in section A above, those provisions are not aimed at the prohibition of any specific activity, petitioner is unable to point to any explicit prohibition directed toward the development at issue. Petitioner therefore must overcome two substantial hurdles. First, it must argue that the admonitions to the states and to the Administrator to enact implementation plans themselves create the basis for inferring prohibitions against specific activities which are alleged to interfere with attainment of the ambient air quality standards. Second, petitioner must establish that, as part of these inferred prohibitions, there exists a cause of action enabling private citizens to prosecute lawsuits of the nature involved herein. Both arguments are essential to petitioner's claims, and both arguments are wholly at odds with the structure and history of the Act. These arguments are closely related and, hence, discussion of one necessarily overlaps with discussion of the other. Respondents, however, will focus primarily on the first argument in this section and on the second argument in the section that follows.

As has been discussed above, the Act depends for its effectiveness upon specific and objective implementation plans and regulations enacted under it, envisioning a coordinated strategy for each air quality control region for the attainment of the ambient air quality standards. Those standards alone were not intended to affect the sources of pollution. The Senate Committee report notes:

> "The establishment alone of ambient air quality standards has little effect on air quality. Standards are only the reference point for the analysis of the factors contributing to air pollution and the imposition of control strategy and tactics. This

program is an implementation plan." *Report of the Committee on Public Works to Accompany S. 4358,* Senate Report No. 91-1196 at 11-12 (1970).

Indeed, not even the Administrator has authority under the Act to enforce the ambient air quality standards absent specific regulation. His predecessor, the Secretary of Health, Education and Welfare had enjoyed such authority, in limited circumstances, under the 1967 amendments. 81 Stat. 491. This power was eliminated by the 1970 amendments, and the Senate Committee Report indicates that this was a purposeful attempt to avoid the unsatisfactory generality attendant on such a regulatory approach:

> "Because attainment of ambient air quality is possible only through the enforcement of precise and objective emission controls the Committee bill would delete the enforcement requirement for the abatement of violations of the air quality standard." Senate Report, *supra,* at 21.

Ineffectiveness of the prior approach was not the only reason or even the most important reason that enforcement procedures were left solely to the implementation plans and the Administrator's regulations under the 1970 amendments. Air quality control is a complex and multi-faceted problem, requiring a coordinated regional approach for a regional effort to attain the desired standards. The case by case analysis that is the heart of the common law approach to problems is not consistent with this approach and the courts are not equipped to make the complex policy decisions required. *See, Diamond v. General Motors,* 20 Cal. App.3d 374 (1971); *Crandall v. Biergans,* 3 E.R.C.

1827 (Mich. 1972). Indeed, decisions requiring specific methods of air quality control in isolated cases without reference to the integrated plan of control could seriously hinder the effectiveness of the Act by reducing the options open to the states and to the Administrator in formulating control tactics for overall air quality improvement.

Fears of precisely such an effect were voiced during the Senate debates on the inclusion of a private cause of action in the 1970 amendments. Senator Cooper, during his remarks on the floor, indicated that the Committee which reported the bill out had been concerned that "the development of a common law of pollution could reduce the effectiveness of the Clean Air Act." *Congressional Record,* September 22, 1970, p. S16257. As the Committee report states, the private cause of action was allowed to remain because enforcement provisions under the Act would involve only the objective question of whether or not an implementing regulation had been violated:

> "[The private suits provision] would not substitute a 'common law' or court-developed definition of air quality. An alleged violation of an emission control standard, emission requirement, or a provision in an implementation plan, would not require reanalysis of technological or other considerations at the enforcement stage. These matters would have been settled in the administrative procedure leading to an implementation plan or emission control provision. Therefore, an objective evidentiary standard would have to be met by the citizen who brings an action under this section." Senate Report, *supra,* at 36 (1970).

The case at hand is illustrative of the difficulties which Congress intended to avoid by its continued adherence to specific behavior criteria rather than generalized reference to air quality. Petitioner submitted the Affidavit of James Behar [C.T., Vol. I, p. 53] to the District Court in support of its assertion that the development of Fashion Park will result in a deterioration in the quality of air in the immediate vicinity of the shopping center. These respondents, on the other hand, submitted the Joint Affidavit of John Dunzer, Vincent Mestre and Dr. G. S. Samuelson [C.T., Vol. II, p. 99] showing that developments of this nature could be a method of reducing pollution inasmuch as the shopping center would result in the overall improvement of air quality in the San Gabriel Valley as a whole by significantly reducing the total miles driven each day. The District Court was thus asked by appellants not simply to rule that this particular development could not go forward, but also to hold that the approach to pollution control it offered was improper. It would have been neither appropriate nor lawful for the District Court so to restrict the discretion of the Administrator in these matters. The promulgation of specific enforcement provisions must be left where Congress intended, with the states and the Administrator.

2. Appellants Do Not Have Standing to Bring a Private Cause of Action for Enforcement of the Ambient Air Quality Standards Without Reference to Regulations Implementing Those Standards.

The 1970 amendments to the Act do provide for citizens' actions. 42 U.S.C. § 1857h-2. This private cause of action is, however, quite narrow in scope and manifestly does not include actions of the nature con-

templated by petitioner. Private civil actions, other than those against the Administrator, are allowed only when the actions challenged are alleged to be "in violation of an emission standard or limitation under the Act or an order issued by the Administrator or a State with respect to such a standard or limitation." 42 U.S.C. § 1857h-2(a). "Emission standard or limitation under this Act" is further defined, in pertinent part, as:

> "A schedule or timetable of compliance, emission limitation, standard of performance or emission standard. . . ." 42 U.S.C. § 1857h-2(f).

Schedules, timetables of compliance and emission limitations are all required elements to be included in state implementation plans. 42 U.S.C. § 1857c-5(a)(2)(B) (1970). Standards of performance and emission standards are to be elements of state plans and Administrator regulations dealing with stationary sources. 42 U.S.C. §§ 1857c-6(a) and (d), 1857c-7(b) (1970). Nowhere in the Act are the ambient air quality standards, as petitioner would have the Court believe, treated as "emission standards or limitations." It is thus evident, as the legislative history discussed in section B.1 above would lead one to expect, that the private action provided in the Act may be maintained against private entities only to enforce compliance with specific existing regulations.

Petitioner continues to press for a right of action independent of implementing regulation, however, arguing somewhat viscerally that the Administrator has failed to comply with the timetables established by the Clean Air Act for the promulgation of such regulation. This failure, petitioner suggests, would leave the Act impotent in the absence of the right of action it asserts and thereby justifies the judicial creation of a pri-

vate cause of action where none is provided. This argument is without merit, for petitioner is hardly without remedy. Its appropriate action, should it be correct in its assertion that the Administrator has not complied with the timetable for promulgation, would be for mandamus requiring promulgation.[7]

More fundamentally, however, petitioner has failed to bring to the attention of this Court the recent regulatory and legislative developments outlined in subsection A.3 above which indicates that the Administrator is fully in compliance with the timetable of the Clean Air Act in the adoption of regulations dealing with facilities such as Fashion Park. On February 25, 1974, the Administrator promulgated the Indirect Source Regulations which require preconstruction review and approval of facilities such as Fashion Park. 39 Fed. Reg. 7270; 40 C.F.R. § 52.52. The effective date of these regulations is January 1, 1975, hence excluding Fashion Park from the requirements. However, far from being in conflict with the Act, this late effective date has been explicitly authorized by section 4(b) of the Energy Supply and Environmental Coordination Act.[8]

Therefore, in contrast to the impression which petitioner has attempted to create, there presently exist regulations governing facilities of the nature involved herein. It is true that these regulations do not affect Fashion Park because of their effective date of January 1, 1975, but this effective date has been explicitly au-

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[7]At the time this action was filed, the Administrator was, in fact, already acting pursuant to just such a mandate. *See Riverside v. Ruckelshaus*, 4 E.R.C. 1728 (C.D. Cal. 1972).

[8]The Energy Supply and Environmental Coordination Act also ratified a similar deferral of the effective date of the parking management provisions of the California Transportation Control Plan. See section A.3 above.

thorized by Congress. Respondents thus respectfully submit, petitioner's rhetoric aside, that the Administrator is in compliance with the Act's timetables and the construction of Fashion Park is being carried forward in full compliance with the plainly expressed intent of Congress.

D. PETITIONER'S ARGUMENTS BASED UPON THE PROVISIONS OF 42 U.S.C. § 1857h-1 WERE NOT RAISED BELOW AND ARE IMPROPERLY INCLUDED IN ITS PETITION HEREIN.

In its petition, petitioner suggests that the provisions of 42 U.S.C. § 1857h-1, the pollution emergency provision of the Clean Air Act, provide authority for the issuance of a writ of mandamus addressed to the Administrator requiring him to act to prevent the operation of Fashion Park. Petitioner appears to argue, first, that this section authorizes private suits against fancied sources of pollution and, second, that the Administrator can be compelled by such suits to exercise the powers bestowed upon him by that section to achieve the results that petitioner seeks herein.

These contentions appeared for the first time on appeal. Petitioner never suggested these arguments to the District Court, and respondents had no opportunity to argue these issues in that forum. Under these circumstances, it was perfectly proper for the Court of Appeals to reject consideration of these arguments. *Westinghouse Electric Corp. v. Weigel*, 426 F.2d 1356 (9th Cir. 1970); *Eason v. Dickson*, 390 F.2d 585 (9th Cir. 1968), *cert. denied* 392 U.S. 914.

In an effort to excuse the untimely manner in which these contentions were raised, petitioner asserts that the alleged facts which gave rise to this argument were wholly unknown until petitioner filed the affidavit of

Dr. Goldsmith on November 16, 1973. This somewhat improbable contention, even if accepted, offers feeble excuse for petitioner's failure to raise this argument below. By its own admission, all the facts ware available by November 16, 1973. The District Court did not render its opinion until nearly one month later and did not lose jurisdiction of this matter until the Notice of Appeal was filed on January 9, 1974. Petitioner had ample opportunity to bring these matters to the District Court's attention, but chose not to do so. Having made that decision, it could not repent of it and raise those matters for the first time on appeal.

In any event, the arguments which petitioner attempted to inject into the appeal do not alter the propriety of the result reached by the District Court. The legislative history of the Clean Air Act plainly shows that the emergency powers contained in 42 U.S.C. § 1857h-1 were intended to provide emergency remedies to handle "unusual atmospheric inversion or other extraordinary grouping of circumstances creating a substantial and imminent danger to public health," and not to handle "chronic or generally recurring pollution problems" such as those extant in the San Gabriel Valley.[9] House Report No. 728, October 3, 1967, reprinted in 1967 U.S. Code Congressional and Administrative News, Vol. 2 at 1964 (dealing with the original pollution emergency provisions in the 1967 legislation). *Accord* Senate Report No. 911196, September 17, 1970, at 35-36 (discussing the present wording of these provisions). The provisions of 42 U.S.C. § 1857h-1 are thus wholly inapplicable to the issues at hand.

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[9]These powers are, of course, reserved solely to the Administrator of the Environmental Protection Agency and are not, as appellants seem to suggest, available to private persons.

Conclusion.

Respondents Anita Associates and Santa Anita Consolidated, Inc. respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

SIDNEY H. WALL
Attorney for Respondents Anita Associates and Santa Anita Consolidated.

Of Counsel:
O'MELVENY & MYERS,
PHILIP F. WESTBROOK, JR.,
FRANCIS J. BURGWEGER, JR.,
JAMES W. COLBERT, III,
and
BARRETT, STEARNS, COLLINS,
GLEASON & KINNEY, INC.,
A Professional Corporation.

APPENDIX A.

Section 1857c-5, Title 40, United States Code.

(a) (1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 1857c-4 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or each portion thereof.

* * *

(c) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

(1) the State fails to submit an implementation plan for any national ambient air quality primary or secondary standard within the time prescribed,

(2) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, * * *

(d) For purposes of this chapter, an applicable implementation plan is the implementation plan, or most recent revision thereof, which has been approved under subsection (a) of this section or promulgated under subsection (c) of this section and which implements a national primary or secondary ambient air quality standard in a State.

Section 1857c-6, Title 40, United States Code.

(a) For purposes of this section:

(1) The term "standard of performance" means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated.

Section 4(b), Pub. Law 93-319, 88 Stat. 246.

(b) Subsection (c) of section 110 of the Clean Air Act is amended by inserting "(1)" after "(c)"; by redesignating paragraphs (1), (2), and (3) as subparagraphs (A), (B), and (C), respectively, and by adding at the end thereof the following new paragraph:

* * *

"(C) The Administrator is authorized to suspend until January 1, 1975, the effective date or applicability of any regulations for the management of parking supply or any requirement that such regulations be a part of an applicable implementation plan approved or promulgated under this section. The exercise of the authority under this subparagraph shall not prevent the Administrator from approving such regulations if they are adopted and submitted by a State as part of an applicable implementation plan. If the Administrator exercises the authority under this subparagraph, regulations requiring a review or analysis of the impact of proposed parking facilities before constructing which take effect on or after January 1, 1975, shall not apply to parking facilities on which construction has been initiated before January 1, 1975.

"(D) For purposes of this paragraph—

"(ii) The term 'management of parking supply' shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

* * *